THE UNIFORM PARTNERSHIP ACT—A REPLY TO MR. CRANE'S CRITICISM

[*Concluded*]

Does the Act Adopt the Aggregate Theory of Partnership?

THE second general criticism of the Act is that though the intention of the draftsmen was apparently to proceed on the aggregate theory, "the Act does not adopt either the entity [legal person] or aggregate view of the nature of the partnership," and that, therefore, "in matters not expressly covered by any provision of the Act, and which depend upon the nature of a partnership, different results will be reached by different courts, and so we shall not attain the uniformity sought for by the Act." [40]

In support of the criticism Mr. Crane takes up first the definition of a partnership in Section 6, arguing that as worded it is not inconsistent with a court's treating the partnership as a "legal person." The Act, as stated, defines a partnership as "an association of two or more persons." Mr. Crane alleges that "an association may or may not be treated as a legal person," and that therefore the word is "ambiguous." [41] To this it may be answered, that if the common law proceeded on the assumption that every association of two or more persons for any purpose created a separate legal person, then it would have been necessary to add to the definition the words: "but the association shall not be considered a separate legal person"; but as our common law proceeds on the principle that an association of two or more persons does not *primâ facie* create a separate legal personality, it is not necessary that the words quoted should have been added to prevent the courts drawing the inference that a partnership is a legal person. Indeed, all that Mr. Crane subsequently contends is that in other sections of the Act the draftsman has unconsciously treated the partnership as a legal person and therefore a court, in a state adopting the Act, would be justified in holding that a partnership is a legal person in view of the fact that the legal personality of the

[40] 28 Harv. L. Rev. 774. [41] *Ibid.*, 770.

partnership is not expressly denied in the definition. The force of this last argument can only be judged by examining each of the sections which he asserts show an unconscious adoption of the legal-person theory.

One of these sections is the 25th, already referred to as expressly stating that "a partner is co-owner with his partners of specific partnership property." Mr. Crane's argument is, that as under this section a partner can only possess, use, or assign partnership property for a partnership purpose, and as on his death his rights in the property pass to his partners,[42] "The nature of co-ownership by the partner under this Act is not such as to exclude the legal personality of the partnership, but on analysis appears rather to be in harmony with that theory than any theory which denies the legal personality of the partnership."[43]

It is not clear why the fact that the partner can only use partnership property for the common benefit of himself and his associates, or only assign for their collective benefit, implies the assumption that the rights in the property which the partner can and does lawfully exercise inhere not in him but in a fictitious legal person. He apparently agrees with the Commissioners that a partnership should have the rights, and no more than the rights, over specific partnership property given in Section 25. The point at issue between those who sustain the theory on which the Act is drawn and the advocates of the legal-person theory is whether these rights shall be regarded as being possessed by the partner, or whether the partner, while having a right to exercise them, shall be regarded as doing so as an agent acting on behalf of a legal person "formed," to use the words of Dean Ames' definition of partnership, "by the association of two or more persons for the purpose of carrying on

[42] A partner's interest in the partnership, as distinguished from his right as co-owner of specific partnership property, is defined in the Act as "his share of the profits and surplus." See Sec. 26. This interest may be assigned (Sec. 27), and may be charged with the payment of his separate debts on application to a competent court by any separate creditor who has obtained a judgment. See Sec. 28, which is based on Sec. 23 of the English Partnership Act.

[43] 28 HARV. L. REV. 773. Mr. Crane also says that "One partner could not recover against third persons for injury to his rights as co-owner of partnership property." 28 HARV. L. REV. 773. There is no reason under the wording of the Act why such recovery should not be had. They are his rights by the express words of Sec. 25. If Mr. Crane means that only nominal damages should be recovered, that, of course, is correct.

business with a view to profit." If this last conception is the one which it is desired to express then the Act will properly declare, as it is declared in both the drafts prepared by Dean Ames, that "the legal title to partnership property is vested in the firm." On the other hand, if it is desired to express the idea that the rights of the partner to possess and assign partnership property for the benefit of himself and his associates shall vest in him, then, it is submitted, the proper way to express this idea is to say, as in Section 25 of the Uniform Act: "A partner is co-owner with his partners of specific partnership property holding as tenants in partnership," while at the same time making the legal incidents of the tenancy the rights which Mr. Crane admits a partner should have; but which he, as an adherent of the legal-person theory, would regard as the rights of a partner acting as agent of the partnership legal person.

Another section which Mr. Crane refers to is Section 2, the section containing definitions.[44] It is there provided that the word "person" when used in the Act, includes "individuals, partnerships, corporations, and other associations." With equal propriety one might argue that "individuals," who are also declared in the definition to be included under the word "person," are made collectively a legal person. The fact is that the definition indicates nothing in respect to the theory on which the Act is drawn, being equally in accord with the aggregate or with the legal-person theory. The definition was inserted, as it has been inserted in other Uniform Acts, for the purpose of overcoming a confusion which has arisen solely as the result of the conception that a group of persons conducting a common enterprise should be regarded as having the enterprise conducted for them by a fictitious legal person. A corporation, for instance, is usually regarded as a legal, but not a natural person, or an aggregate of natural persons united for a common enterprise. Therefore, when an act uses the word "person" it is doubtful whether corporations are included. There is also a possibility that some court might regard a partnership, or any other association, as an artificial legal person. The word "person" is often used in the Uniform Partnership Act. In each case groups of persons, whether associated as a corporation, partnership, or any other form of association, as well as persons acting separately are intended. The definition

[44] 28 HARV. L. REV. 770.

also made it possible to shorten the definition of partnership in Section 6. As we have seen, two or more persons carrying on as partners a particular business may associate themselves with others, in another enterprise, and, instead of entering the second association as separate individuals, they may enter it as a partnership group. In the same way a corporation may be a member of a partnership unless its becoming a member is an *ultra vires* act, a matter with which the law of partnership has nothing to do. But partnerships, corporations, or other associations rarely as such become members of a partnership. It would, therefore, have been unfortunate to have been compelled to say in defining a partnership that it was an association of two or more persons, partnerships, corporations, or other associations, because of the bare possibility that some court might hold the word "persons" as not including two or more persons acting in association.

Other sections which Mr. Crane thinks show an unconscious adoption of the legal-person theory are those in which the word "partnership" is used. These are Sections 8, 9, 18, 21, and 35.[45] Section 8 (1) speaks of partnership property. Section 8 (3) enables the partnership to take title in the partnership name. Section 9 (1) makes every partner the agent of the partnership. Section 18 (*a*) makes it the duty of a partner to contribute to losses sustained by the partnership. Section 18 (*b*) requires the partnership to indemnify the partner in respect of certain payments. Section 12 speaks of a fraud by a partner on the partnership. Section 21 makes the partner accountable to the partnership. Finally, Section 35 speaks of the partner's power to bind the partnership. Mr. Crane's contention is that to be consistent with the theory of the definition given in the Act, the term "co-partners" should have been used instead of "partnership," and he further adds that the use of the word "partnership" illustrates "the difficulty, if not impossibility, not only of writing and talking about partnership, but of formulating its rights and obligations without treating it as a legal person." [46]

It is submitted that in making this argument Mr. Crane again assumes that it is not possible to disassociate the activity of the members of an association when working for their common ends from their other activities, without giving to the association as

[45] 28 HARV. L. REV. 770–771.

[46] *Ibid.*, 771.

such a group personality. It is hardly necessary to emphasize again the fact that this assumption is without foundation.

Mr. Crane fails to distinguish between co-ownership of property used in the business of the co-owners and that not so used. He contends that the consistent opponent of the separate legal-person theory should not say "partnership property" but "partners' property." But partners may hold property in common without intending to use the property in the partnership business. The term "partners' property" might be held to include such property. On the other hand, the term "partnership property" brings before the mind the property of the partners which they have devoted to the business and therefore expresses the exact idea intended.

Again, Mr. Crane points out that Section 18 (*b*) requires the partnership, and not the co-partners, to indemnify the partners in respect of certain payments. But if the word "co-partners" instead of "partnership" had been used, a result not intended would have been had. The claim of the partner is not against his co-partners as a separate creditor of each of them, but is a claim against the partners, including himself, associated in partnership; and this joint liability as partners can be and is spoken of as a partnership liability, without involving the assumption that the liabilities of the partnership are the liabilities of a distinct legal person.

In speaking of a fraud by a partner on a partnership, Mr. Crane says: "If partnership means merely 'all the partners' this involves a partner committing a fraud on himself." As he regards a fraud by a man on himself as impossible, he concludes that the use of the word "partnership" in the section referred to must denote a legal person. But partnership means something more than "all the partners." It means all the partners as associated to carry on a particular business. As a matter of fact, a partner may so act as to harm himself, as well as his partners, in so far as their mutual enterprise is concerned. Considered in relation to all his interests he may have derived a benefit from his actions, or at least have acted under the belief that he would derive such benefit; but considered in relation to the common enterprise he has harmed himself in the same way that he has harmed his partners, and reparation is due not to his partners, but to himself and partners as associated in the given business enterprise. It, therefore, is

accurate to say he has defrauded the partnership; but there is no implied or other recognition that the rights and liabilities of the partnership are the rights and liabilities of a separate legal personality.

Mr. Crane says that the section which enables real estate to be conveyed to the partnership in the partnership name "makes the partnership as such the subject of rights and thus a legal person." If a partnership is a legal person, then allowing it to obtain property in its own name is not contrary to the theory that it is a legal person. But if a partnership is not a legal person, then allowing the partners to obtain title by conveyance in a name under which their mutual business is carried on does not make their business in legal theory the business of a fictitious legal person. The formalities to pass title are merely rules of thumb. There is no reason why several persons should not become co-owners of property by any formality which the law declares sufficient for that purpose.

This completes our examination of the sections of the Uniform Act on which Mr. Crane bases his conclusion that the "Act does not explicitly adopt either the entity [legal person] or aggregate theory of partnership," and that "It ought to be very difficult for an open-minded court carefully analyzing the whole Act to hold that a partnership is not vested with rights and obligations, and therefore a person before the law." [47] It is submitted that there is no warrant for this conclusion; but that, on the contrary, the adoption of the Act makes it impossible for a court to hold a partnership a legal person, in view of the definition in Section 6, and the express statement in Section 25, that the partners, and therefore assuredly not a fictitious legal person, are co-owners of partnership property holding as tenants in partnership. The theory on which the Act is drawn may be wrong, but a reading of its provisions will show that the Commissioners have adhered to the aggregate theory, dominant in our partnership cases, and have not adopted the legal-person theory.

The Matter of Fraudulent Conveyances

Mr. Crane's third criticism is that the Act does not contain any section on fraudulent conveyances; that "in omitting to deal with this subject, the Act leaves unanswered questions as to which there

[47] 28 Harv. L. Rev. 773–774.

has been probably greater conflict of authority than on any other point of partnership law," and therefore herein "signally fails of its avowed purpose to make uniform the law of partnership." [48]

No one familiar with the cases can doubt for a moment that the whole subject of fraudulent conveyances is in much confusion, and that conveyances by partners are no exception to this statement. The drafts prepared by Dean Ames did not contain a section on the subject. The First Draft which the writer prepared on the aggregate theory did contain such a section, and the section was retained in each subsequent draft until the Eighth. The Committee on Commercial Law and the Conference of Commissioners devoted much time to the discussion of the subject of the section. These discussions, while they greatly improved the form of the section, convinced the Commissioners that instead of treating the subject in the Partnership Act, a more satisfactory solution of the difficulties presented would be had if the Commissioners prepared a Uniform Act on Fraudulent Conveyances, treating in that Act fraudulent conveyances by partners. They have therefore directed their Committee on Commercial Law to prepare and submit for their consideration a draft of such an Act.

One bad result of legal fiction, as has been already more than once shown, is that it prevents an examination of the real issue involved and the facts on which it should be decided, by compelling in a given case a particular decision. Law thus tends to become the expression of preconceived theories rather than of life and its needs. This bad result, as illustrated by the result of the fiction that a partnership is a legal person, is shown by a consideration of the four situations given by Mr. Crane in which the question whether the conveyance by the partners of partnership property is fraudulent may arise and on which authorities are in conflict.

These are:

"(1) The firm being insolvent applies its assets, or part of them, to pay a debt of the partners not a partnership debt.

"(2) The firm being insolvent applies its assets, or part of them, to the payment of separate debts of one or more partners.

"(3) The firm being insolvent transfers its assets to a partner.

"(4) The firm being insolvent divides its assets among the partners." [49]

[48] 28 HARV. L. REV. 777.

[49] *Ibid.*, 774–775.

Now under any theory of partnership there is no possible justification for the second and third conveyances. A man owes a debt he cannot pay. He has property which he owns in common with others. Without paying his debt, he gives away this property to pay a debt of one of his co-partners, which is the second situation; or he gives his property to one or more of his co-owners without imposing on them any trust for the benefit of his creditors, which is the third situation. The first and fourth situations, however, present a problem of no small difficulty. The question involved is whether two or more persons having made *inter se* a contract to create a fund which shall be owned in common and devoted to the payment of joint debts contracted in carrying on a particular business, should be allowed after insolvency mutually to rescind that contract and so deal with their common property as to affect the relative amounts which different classes of their creditors will receive. This, like other questions of our commercial law, should be settled only on careful examination of actual business conditions. The theory that a partnership is a legal person, leading necessarily to one conclusion, prevents any real examination of what is practical and just in view of the actual conditions under which partners carry on their business.

Answers to Criticisms of Specific Sections

In addition to the criticisms already discussed Mr. Crane at the close of his article points out alleged defects in several sections.

In re Section 8

Section 8 (3) provides that where the title is in the partnership name any partner may convey title to such property by a conveyance executed in the partnership name. He suggests that in the interest of the title searcher these provisions "should be accompanied by such amendments of the laws regulating the acknowledgment and registration of deeds as are necessary to make it appear on the record that the person executing the deed in the partnership name is a partner and is authorized to convey." [50]

It is not necessary to amend existing laws in relation to acknowledgments to enable a partner signing the partnership name to

[50] 28 Harv. L. Rev. 779.

set forth that he is a partner. Indeed it is difficult to see how he could acknowledge the signature without doing so. As to the suggestion that he should be required to set forth that he is authorized to convey, to adopt it would burden the conveyance with an unnecessary formality and, therefore, one which might uselessly raise a litigable question in case it was omitted. The declaration is useless because Section 8 (3) expressly provides that the partner's act in signing a deed conveying the property in the partnership name binds the partnership, even where the conveyance is not an act for carrying on the business of the partnership in the usual way, if the grantee or a person claiming through such grantee is a holder for value without knowledge that the partner in making the conveyance has exceeded his authority.

In re Section 9

Section 9 (1) provides that the act of every partner "for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership." Mr. Crane suggests that instead of the words quoted the wording of the English Partnership Act should have been followed, which provides that "Any act," by a partner, "for the carrying on in the usual way the business of the kind carried on by the firm," binds the partnership.

The question raised by the suggestion, which was much discussed both by the Committee on Commercial Law and by the Commissioners, is: To what end should the inquiry of the court be directed when it has to decide the scope of a partner's apparent authority? Should the inquiry be: How did the partnership business appear to be carried on? or, How are businesses of the kind carried on by the partnership usually carried on?

It was argued in favor of the second view, as Mr. Crane has argued, that to declare that the inquiry should be: "How is this partnership apparently carried on?" imposes an undue burden on the third person to learn the habits of this particular firm. On the other hand, it was contended that the wording of the English Act was susceptible of the interpretation that a partnership was bound, if the act was a usual act in the business of the kind carried on by the partnership, even though it was apparent that this particular partnership did not carry on the business in that manner. The

argument which finally led the Commissioners to adopt the present wording was that it emphasizes the fundamental reason why a partnership is ever bound by an act of a partner not authorized by his co-partners, namely, that partners are bound because they have held him out to do that class of acts. The question therefore which should be determined in each case is, was it an act for apparently carrying on in the usual way the business of the partnership of which he is a member? Again, even if the contract was not one for carrying on in the usual way the business of the kind carried on by the firm, the partnership should be held, if it was a contract for apparently carrying on in the usual way that particular partnership; a matter which would be more than doubtful if the wording suggested by Mr. Crane had been adopted.

In re Section 16

Section 16 relates to "Partners by Estoppel." Mr. Crane doubts whether the section as worded overrules the case of *Thayer* v. *Humphrey*.[51] In that case A., being in business by himself, held out B., with B.'s consent, as his partner. The court held that creditors of the ostensible firm had priority over other creditors of A. on the assets that A. treated as assets in his business. Mr. Crane points out that in fact the court rested its decision on the ground that there existed a partnership by estoppel, thus making the liability to those who dealt with A. on the faith of B. being his, A.'s, partner, a partnership liability, and that by Section 4 the law of estoppel is expressly made applicable under the Act.

When a contract is made on the faith of a representation that A. is a partner, the contract may be made as in *Thayer* v. *Humphrey* by one man, or it may be made by two or more persons not in partnership, or by two or more persons who are actual partners. In the first two cases there being no partnership liability, only a joint liability should result. It was the express desire, therefore, of the Commissioners to word the section so as to render such a decision as *Thayer* v. *Humphrey* practically impossible. It is submitted that the section as worded accomplishes the desired result.

Section 16 is divided into two paragraphs. The first relates to the claims of those who deal with one or more persons on the

[51] 91 Wis. 276, 64 N. W. 1007 (1895).

faith of the representation that B. is their partner; the second, with the claims of those who deal with B. Paragraph (1) concludes:

"(*a*) When a partnership liability results, he [the person represented to be partner[1] is liable as though he were an actual member of the partnership.

"(*b*) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately."

The paragraph thus clearly recognizes that in some cases a partnership liability results from the contract and in some cases it does not. If in cases where B. consents to be held out as a partner, or holds himself out as a partner, and the contract is made by A., or by A. and C., two persons who are not partners, a partnership liability results by estoppel, to what cases does clause (*b*) apply? To contend that clause (*a*) applied in a case like *Thayer* v. *Humphrey* would be to contend that no case can arise under clause (*b*).

Paragraph (2), as stated, deals with those cases which arise when the person represented to be a partner in any existing partnership or with one or more persons not actual partners attempts to contract for the real or ostensible partnership. The paragraph declares: "Where all the members of the *existing partnership* consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation." For a court to say that a partnership could under this wording exist by estoppel, and that therefore, in a case like *Thayer* v. *Humphrey*, a partnership obligation would result, because both A. and B., all the members of the partnership by estoppel, consented, which the court would have to hold to follow that case, the words "existing partnership" must be held to mean, "existing in fact or by estoppel." It is conceivable that such meaning might be given if it were not that the same expression "existing partnership" is used in the first part of the paragraph, and also in paragraph (1) to contrast a partnership in fact with a partnership by estoppel. The first two lines of paragraph (2) read: "Where a person has been thus represented to be a partner in an existing partnership, *or with one or more persons not actual* partners." So also in paragraph (1): "when a person . . . represents himself, or consents to another representing him to any one, as a partner in an existing

partnership *or with one or more persons not actual partners.*" Thus the term "existing partnership" is clearly indicated not to include the case where A. holds out B. as a partner. In that case a joint liability as expressly distinguished from a partnership liability results, and a decision similar to *Thayer* v. *Humphrey* in this second class of cases, as in the class of cases covered by paragraph (1), would be manifestly inconsistent with the wording of the section.

In re Section 18 (h)

This clause provides that "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners." Mr. Crane suggests that the case where an equal division exists should be provided for. A contract made by one of two partners against the protest of the other is not made by a majority. The implication from the section as worded, therefore, is that such a contract, the third person knowing of the protest, would not be a partnership contract.

In re Section 35

Notice of Dissolution in Case Business of Partnership is Unlawful

Two of Mr. Crane's criticisms relate to matters arising when a partnership is founded to carry on or carries on an unlawful business. Under existing law and under the Act, notice of dissolution does not have to be published, if the dissolution is caused by the unlawfulness of the business, to prevent a partner being held liable for a contract made for the carrying on of the business by a copartner without his authority with one who does not know of the dissolution.

Two classes of cases may arise: One where the business from the start is wholly unlawful; the other where, being lawful, it becomes unlawful, or unlawful to carry it on in partnership. In the following case typical of those falling under the first class the adoption of the Act does not change existing law. A. and B. enter into a partnership to sell liquor at retail in a prohibition state. A. contributes the glasses and the furniture of the room; B., the room or place of sale. Under the Act, the object of the business being wholly unlawful, the partnership is dissolved the moment it is created. B., contrary to his express understanding with A., buys more glasses

in the name of A. and B., intending to use them in the illegal establishment. Under existing law and under the Act the person selling the glasses is not a creditor of A., A. not having authorized the contract, and, of course, he has no claim prior to other creditors of B. on B.'s right in the original glasses or other stock used in the illegal trade. Mr. Crane believes that the Commissioners should have so drawn the Act as to change existing law, and give to the person selling the glasses on B.'s order the right, not merely of a joint creditor of A. and B., but of a partnership creditor of A. and B., and therefore a priority over the separate creditors of A. and B., on the assets used in the wholly illegal business. He says that "The root of the difficulty is in the conception of the illegal contract as a nullity, instead of as an actual contract subject to a personal defense as between the parties to it." [52] With submission, the Act as drawn does not consider the contract in the case put as a nullity. The difference of opinion between the Commissioners and Mr. Crane is whether the law shall or shall not give to those who deal with one of two persons carrying on together a business organized and conducted for a wholly illegal purpose advantages which it gives partnership creditors: First, priority over other creditors joint or separate in certain of the assets of which they are co-owners; and, second, the right to regard themselves as creditors of joint debtors although the contract was made by one of the so-called joint debtors without the authority of the others. It is believed that the Commissioners in not changing existing law in the case put were right; and this for two reasons: First, that the innocence of the person who has extended credit as to the wholly illegal nature of the business is a matter often not subject to certain proof; and, second, that as the right of partnership creditors to priority in partnership assets is due to the right of each partner to have the joint assets applied to the payment of the joint debts, and not to any equity inherent in the claims of the joint creditors, where the business is wholly illegal the law is not required to foster the industry by recognizing the partners' equity.

The second case in which Mr. Crane believes that the Act should change existing law arises where the partnership business, once lawful, becomes unlawful, or it becomes unlawful to carry it on in partnership. Thus, A. and B. are in a lawful business and the busi-

[52] 28 HARV. L. REV. 782.

ness becomes unlawful. Under the Act dissolution occurs, but the affairs of the partnership are wound up in an orderly manner. Suppose, however, neither A. nor B. having published notice of dissolution, or mailed such notice to those who have extended credit to the partnership, B., without A.'s authority, makes a contract in the name of the partnership for the further carrying on of the business, the person with whom the contract is made being unaware that the partnership has been dissolved or that its former lawful business has become unlawful. Under the law and under the Act the third person is a separate creditor of B. Here again Mr. Crane thinks the Act should change the law and make the third person not only a joint creditor of A. and B., but a partnership creditor of A. and B. with priority in partnership assets. He says: "One may well be bound to take notice of so public an event as war, but it seems an injustice in cases where the third person does not know of the foreign residence of a member of the firm with which he believes himself to be doing business, to refuse him a remedy against all members of the firm resident in his own country who might have given him notice."[53]

He also supposes this case: A. and B. are partners in the liquor business, accustomed to buy liquor from a third person resident in a distant state. The people of the city where the firm is located prohibit the sale of liquor by voting "no license." A., without the knowledge of B., continues the business, buying more liquor in the partnership name from the seller resident in the distant state. Mr. Crane believes that B., to avoid being held on the contract, should have given notice of dissolution to the third person. Irrespective of whether wholesale liquor merchants are ever ignorant of a matter so vital to their business as a vote for or against license in a territory where they have been making sales, it may be admitted that both cases given by Mr. Crane, the facts being as he represents, are illustrations of real hardship on the innocent third person. On the other hand, it must also be borne in mind that to fasten liability on the partners who have not authorized the contract is a very real hardship on them. Under Mr. Crane's suggested alteration of the law they would be penalized for not taking a precaution against the partner doing, not only an act which they have not authorized, but which has, by positive municipal law,

[53] 28 HARV. L. REV. 782.

become unlawful. It may, of course, be pointed out that it is a hardship to make a partner liable for a contract of his co-partner which he has not authorized, where the contract has been made after dissolution, the dissolution taking place by the will of the partners, and yet the law in this case makes him liable if no notice has been given of the dissolution in the manner prescribed by law. This is true; but a strong reason in that case for imposing the liability on the partner is that otherwise he might escape liability on contracts which were burdensome by declaring that the partnership had been dissolved by the expressed will of one of the parties, something which it would in many cases be impossible for the third person to disprove. When, however, the partnership is dissolved because the business has become illegal, if the law allowed a third person, who was ignorant of the fact that the business had become illegal, to hold the partners who had not authorized the contract if they had not given notice of dissolution, it would be very easy for the third person to assert his ignorance, and often difficult to disprove the assertion. Thus the same kind of reason — difficulty of disproving a fact easily alleged — which leads to the conclusion that partners should give notice of dissolution in the ordinary case of dissolution, leads to the conclusion that partners should not be required to give notice where dissolution is caused by the business becoming unlawful. The writer therefore believes that, as in the first case, where the business of the partnership was wholly illegal from the start, the decision of the Commissioners not to change existing law is correct.

In re Section 38 (1)

Section 38 (1) declares that a partner on dissolution has a right as against his co-partners to have the partnership property applied to discharge its liabilities. Mr. Crane says: "It should be expressly stated that such rights may be enforced by the representative of a deceased partner." [54] It is submitted that this is not necessary. The right given in the section is an equitable one for the protection of a property interest, which property interest passes on the death of a partner to his personal representative. It is hardly conceivable that any court would deny the right of a person on whom the property interest devolved to protect it.

[54] 28 HARV. L. REV. 784.

In re Section 40 (h)

Mr. Crane is of the opinion that the Act, in spite of the Bankruptcy Act, and the almost universal current of authority at common law to the contrary, should have been so drawn as to permit the partnership creditors to share equally in the separate assets of the partner. He makes the usual argument in favor of this change in the law, namely, that the rule giving separate creditors priority on separate assets is not in accord with any theory of partnership. This argument has force, because, at least under the theory on which the Uniform Act is drawn, a partnership creditor is just as much a creditor of a partner as a separate creditor. Those who support the dominant rule do not deny this. All they say is that as the partnership creditors have to be given a priority on partnership assets, to which priority they are not entitled by any equitable superiority of their claims, it is only equitable that a similar priority on separate property should be given to the separate creditors. This "equitable" argument either appeals or not. Once stated, no additional arguments can strengthen or weaken it. It does not appeal to Mr. Crane. It did not and does not now appeal very strongly to the present writer. But he has been forced to recognize that it is an argument which does appeal to the great majority. Each year the members of his law class are overwhelmingly in favor of giving the separate creditors priority on separate assets. A majority of the Committee on Commercial Law of the Commissioners on Uniform State Laws were in favor of such action, and an overwhelming majority of the Commissioners voted for the provision as it stands in the Act after full discussion. Mr. Crane says: "It is not to be expected that a state such as Connecticut, whose highest court after the fullest consideration deliberately departed from the conventional rule, will return thereto in order to secure uniformity." [55] On the contrary, the writer's experience would lead him to believe that the members of the legislature of that state would not hesitate to let the separate creditors have that first chance at separate assets which the partnership creditors must be given on partnership assets, and that the majority of the members of the bar of that state would have no objection to their doing so. However this may be, it is certain that the Act could not pass

[55] 28 HARV. L. REV. 785.

in most states did it contain the change suggested by Mr. Crane. To which may be added that had the Act given partnership creditors equal rights with separate creditors on separate assets, those advocating its passage in almost all the states would not only be asking their legislatures to change a settled rule of law, but to adopt a different rule than that of the Bankruptcy Act. In the great majority of cases where partners are insolvent, the distribution of their estates takes place under the Bankruptcy Act, and in these cases the rule of distribution provided for by that Act would be followed, without regard to the provisions of any state law. In the few cases in which the state court directs the distribution, the rules of distribution should not be different than under the Bankruptcy Act. The extent of a creditor's rights should not depend on the tribunal in which he seeks to enforce them.

In re Section 40 (i)

Section 40 (*i*) provides: "Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order: 1. Those owing to separate creditors; 2. Those owing to partnership creditors; 3. Those owing to partners by way of contribution."

Mr. Crane says that these rules of distribution introduce three changes into the law as it is established by the weight of authority. Irrespective of whether the Act establishes a rule against that followed by the majority of the conflicting cases—a matter not easily determinable—the writer admits that it was the intention of the draftsmen and the members of the Conference to establish the three so-called changes of which Mr. Crane complains.

One consequence of the wording of the clause criticized will be that the claim of a partner who has paid partnership debts, for contribution on the separate estate of his co-partner, is postponed until all other separate creditors have been paid. Mr. Crane believes that such claim of the partner for contribution should be on an equality with the claims of the separate creditors. It is submitted that the partner, by paying the partnership debts, should be held to have stepped into the right of the partnership creditors against the separate assets of the insolvent partner. He should not obtain, however, in respect to that estate a better position than the person whose claim he has paid. Indeed, if he were

allowed to do so, the rule giving priority to separate creditors on the separate estate would be to that extent nullified. It would thus appear that Mr. Crane's criticism is really the result of his objection to the rule that gives priority to the separate creditors.

Another consequence of the clause as worded is that a partner's claim on a matter unconnected with the partnership takes precedence over the claims of the partnership creditors. Mr. Crane objects to this on the ground that it permits the partner to compete with his own creditors. In a sense he is permitted so to compete, but not for his own advantage. If the claimant partner is solvent and will not pay the partnership creditors, they may attach his claim against the co-partner, put him into bankruptcy, or begin insolvency proceedings against him. This, however, is not the normal situation. If there are partnership creditors making claims on the estate of the insolvent partner it is invariably because, not only one, but all the partners are insolvent. In such case the contest is between the partnership creditors and the separate creditors of each partner. Suppose A., B., and C. are partners, and insolvent. A., on a matter outside of partnership transactions, owes B. $1,000.00. Under the Act this claim of B. is an asset of his separate estate which may be worth something to B.'s separate creditors and, when they are paid, to the partnership creditors. Did the Act follow Mr. Crane's suggestion the claim of B. would be of no benefit to his separate creditors because, by supposition, A.'s estate is not sufficient to pay all his separate and all his partnership creditors. Here again the Act as drawn prevents the partnership creditors from obtaining part of the separate estate of a partner — in this case the estate of the claimant partner — until his separate creditors are satisfied.

Lastly, Mr. Crane objects to the preservation of the priority of the separate creditors where there is no partnership estate and no solvent partner. In this much mooted question the Commissioners have followed the opinion of the late Judge Lowell in *Re Wilcox*.[56] In that justly celebrated opinion the leading judicial authority on bankruptcy showed that the exception to the general rule of priority of the separate creditors on separate assets, for which exception Mr. Crane contends, would be ineffective because there is nothing to prevent the separate creditor from creating a

[56] 94 Fed. 84 (1899).

partnership fund by paying a nominal sum for some worthless claim of the partnership. The exception cannot be justified on principle unless the entire rule giving priority to the separate creditors on the separate estate is considered unsound. It is, of course, true that where there is no partnership property the priority of the partnership creditors on partnership property is of no benefit to them. But neither is the priority of the separate creditors on separate estates of any benefit to them when there are no such assets. Furthermore, the decision in the Wilcox case is now being generally followed as representing the correct interpretation of the present Bankruptcy Act.[57]

In re Section 43

This section provides: "The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding-up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary."

Mr. Crane's first objection to this section is that it treats the surviving partner as a debtor. He correctly says that a surviving partner (and he might have added, any winding-up partner) is a fiduciary, and that he is so treated in Sections 21, 25 (2), and 42. But it is submitted that the section, as worded, is not inconsistent with the principle that the winding-up partner is a trustee. It merely provides when the right to demand an account accrues.

Again, Mr. Crane objects to the right to demand an account accruing on dissolution. If the right to demand an accounting does not accrue at once on dissolution, when does it accrue? If we say in a reasonable time, the question of what is a reasonable time raises in each case a litigable question. The winding-up or surviving partner is a trustee, but he is not a trustee for the continuous management and care of property, neither are the beneficiaries nominally women and children, but business men, his partners or the executors of his partners. The time for the tolling of the right to demand an account depends on the wording of the local Statute of Limitations affecting trusts.

Finally, Mr. Crane says that a winding-up partner (trustee) should not be required by the court to account while he is proceed-

[57] Matter of Hull, 34 Am. B. Rep. 447 (1915), and cases cited, 448, 449.

ing as rapidly as may be to sell the partnership property and pay the debts. But why not? Why should not a man who is admittedly holding property for another be obliged to render an account? Suppose A. and B. are partners. A. dies. B. may properly take some time to sell the partnership property and pay the debts; but that is no reason why A.'s executor should not at once demand from B. an account of the partnership property, the debts due, and the estimated value of A.'s interest. Indeed, there is every reason why he should make such a demand. Mr. Crane apparently supposes that the word "account" as used in the section means that the account shall show a sum of money which the winding-up partner admits he owes the other partner or his executor. There is, of course, no warrant for this supposition. A trustee may submit an account showing the property which he holds as trustee, but unless he admits that he has received money or property which should be paid or conveyed to the person to whom the account is submitted, the submission of the account does not make him a debtor. The argument, therefore, that "if a court grants an accounting it must in due course make a decree, holding the partner who as a result of the accounting proves to be a debtor to his co-partner or co-partners liable in a certain amount, although some assets of the partnership cannot immediately be exactly appraised, and as to any of the assets the amount of the appraisements may not be realized," [58] is based on a mistaken idea of the necessary nature of an account. Ultimately, when the partnership property is sold and the debts paid, the court will make a decree directing the payment of the sum then properly due the plaintiff; but no such decree could be properly made before the property of the partnership has been sold, unless there had been a neglect to sell amounting to a breach of trust.

Neither is it true, as asserted by Mr. Crane, that "if the action accrues at once, . . . and if assets are received by a partner at a time subsequent to the dissolution by a period longer than the statutory period, there is no enforceable obligation." [59] The section deals with the rights of a partner or his legal representative against two classes of persons, winding-up partners and surviving partners, whether such surviving partners are carrying on the business, winding it up, or doing nothing. It does not deal

[58] 28 HARV. L. REV. 787. [59] *Ibid.*, 787.

with the right of a partner against a non-winding-up partner where all the partners survive. Where the property is received by a winding-up or surviving partner more than the statutory period, if any, after dissolution, the claim is barred, as it should be barred, if the partner making the claim has never insisted on an account. On the other hand, if an account had been filed, either voluntarily or as a result of a court's decree, the statute is tolled and the court would decree the trust obligation in respect to it.

In re Section 35

Relating to Dormant Partners and Notice on Dissolution

When Mr. Crane's article appeared the evident time and care spent on its preparation warranted the writer in calling the attention of the Committee on Commercial Law of the Commissioners on Uniform State Laws to his criticisms. Those parts of his article which relate to the nature of a partnership, the consistency of the Act as drawn with the aggregate theory, and the omission of a section on Fraudulent Conveyances dealt with subjects to which, as indicated, the Committee and the Conference of Commissioners had given exhaustive consideration. Those members of the Committee who have examined his criticisms of specific sections just discussed, mainly for the reasons given by the writer, do not believe they are well founded.[60] We all agreed, however, that Mr. Crane had discovered a matter which it was desirable to change. Section 35 relates to the power of a partner to bind his co-partners by contracts made after dissolution. There is a possibility, although the possibility is very remote, that under the section as printed in the original official copy of the Act a dormant, by which is meant a secret and inactive, partner might be bound to a person who extended credit to the partnership after dissolution, unless notice of dissolution had been given or published. There is also a bare possibility that, in the absence of publication of notice of dissolution, a person who extended credit to the partnership after dissolution might hold all the partners, although such person never heard of the partnership prior to dissolution. It was, of course, not the intent of the Commissioners in drafting the section to produce these results. The Committee called the matter to the

[60] The Committee reported this result of their examination of the criticisms to the Conference of Commissioners held at Salt Lake City.

attention of the Conference of Commissioners held in Salt Lake City last August, and the Conference gave the Committee power to re-draft. The section as re-worded by the Committee is given in the note, and all of us who have spent time and labor on the Act are under obligation to Mr. Crane for calling the matter to our attention.[61]

Conclusion

Mr. Crane concludes his article with this sentence: "While the Act contains improvements in the law of many states, it is submitted that no state should adopt it without eliminating the defects which have been indicated." [62] The writer has prepared this article to

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[61] Section 35 (Power of Partner to Bind Partnership to Third Persons After Dissolution) (1) After dissolution a partner can bind the partnership except as provided in Paragraph (3).

(*a*) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(*b*) By any transaction which would bind the partnership if dissolution had not taken place provided the other party to the transaction:

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under Paragraph (1*b*) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:

(*a*) Unknown as a partner to the persons with whom the contract is made; and

(*b*) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(*a*) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(*b*) Where the partner has become bankrupt; or

(*c*) Where the partner has no authority to wind up partnership affairs, except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been published as provided in Paragraph (1*b*II).

(4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

[62] 28 Harv. L. Rev. 789.

show that the defects alleged do not exist. The section in which a defect may be said to have existed in the first official draft of the Act has already been corrected.

Of course, the real reason why a legislature would adopt the Act is not that it is not vulnerable to all criticisms contained in Mr. Crane's article, but that the Act itself will, to a great extent, unify the law of partnership and make certain existing uncertainties, and that where it will change existing law the changes will be improvements. The necessary limitations of space make it impossible for the writer to touch on these matters in this article; but the interested reader will find that he has dealt at some length with what he believes to be the many advantages of the Act in the June number of the Yale Law Journal.

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